

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**



74-1969-2341-2366

To be argued by  
EUGENE R. ANDERSON

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**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

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IIT, an International Investment Trust, and GEORGES BADEN,  
JACQUES DELVAUX and ERNEST LECUIT, as Liquidators for IIT, an International Investment Trust,

*Plaintiffs-Appellees-Cross-Appellants,*

—against—

VENCAP, LTD., INTERVENT, INC., INTERCAPITAL, N.V.,  
RICHARD C. PISTELL, CHARLES E. MURPHY, JR.,  
DAVID TAYLOR and HAVENS, WANDLESS, STITT &  
TIGHE,

*Defendants-Appellants-Cross-Appellees,*  
and

WALTER BLACKMAN, ROBERT L. VESCO, MILTON F.  
MEISSNER, NORMAN LeBLANC and STANLEY GRAZE,

*Defendants.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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**BRIEF OF PLAINTIFFS-APPELLEES-CROSS-APPELLANTS**

IIT, an International Investment Trust, and  
GEORGES BADEN, JACQUES DELVAUX and  
ERNEST LECUIT, as Liquidators for IIT,  
an International Investment Trust

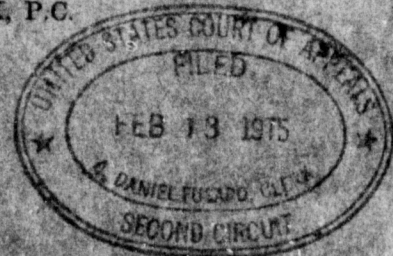
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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

Docket Nos. 74-1969, 74-2341, 74-2366

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IIT, an International Investment Trust, and GEORGES BADEN,  
JACQUES DELVAUX and ERNEST LECUIT, as Liquidators for  
IIT, an International Investment Trust,

Plaintiffs-Appellees-Cross-Appellants,

-against-

VENCAP, LTD., INTERVENT, INC., INTERCAPITAL, N.V., RICHARD  
C. PISTELL, CHARLES E. MURPHY, JR., DAVID TAYLOR and  
HAVENS, WANDLESS, STITT & TIGHE,

Defendants-Appellants-Cross-Appellees,

and

WALTER BLACKMAN, ROBERT L. VESCO, MILTON F. MEISSNER,  
NORMAN LeBLANC and STANLEY GRAZE,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
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BRIEF OF PLAINTIFFS-APPELLEES-CROSS-APPELLANTS  
IIT, an International Investment Trust, and GEORGES BADEN,  
JACQUES DELVAUX and ERNEST LECUIT, as Liquidators for IIT,  
an International Investment Trust

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### ORDERS APPEALED FROM

Defendants Vencap, Ltd. ("Vencap"), Intervent, Inc. ("Intervent"), Intercapital, N.V. ("Intercapital"), Richard C. Pistell ("Pistell"), Charles E. Murphy, Jr. ("Murphy"), David Taylor ("Taylor") and Havens, Wandless, Stitt & Tight ("Havens Wandless") have appealed from an Order of District Court Judge Charles E. Stewart, Jr., Southern District of New York, dated July 3, 1974, preliminarily enjoining Vencap, Intervent, Intercapital, and Pistell from utilizing the assets of Vencap, Intervent, Intercapital and plaintiff IIT, an International Investment Trust ("IIT"), and appointing Arthur I. Burns, Esq. as Receiver to take control of IIT's assets in the possession or control of Pistell, Vencap, Intervent and Intercapital and the assets of those corporations.

Plaintiffs IIT and Georges Baden, Jacques Delvaux and Ernest Lecuit, the Liquidators of IIT, have cross-appealed from an Order of the District Court, dated September 3, 1974, permitting Vencap to disburse \$40,000 for a mining concession in The Cameroons.

### BASES OF APPEAL

The defendants have written their briefs as if this matter were an appeal under Section 1292(b) of the

Judicial Code - an appeal involving a controlling question of law for which the permission both of the Court below and this Court is required.\* Technically this is an appeal under Section 1292(a) - an appeal involving the granting of an injunction and the appointment of a receiver.

In view of the completeness of the record and the central importance of the jurisdictional question plaintiffs, too, believe that this Court should treat this matter as a Section 1292(b) appeal. A definitive ruling at this time will materially advance the ultimate termination of this litigation.

#### ISSUES PRESENTED FOR REVIEW

1. Does the United States District Court have subject matter jurisdiction under the United States securities laws over a misappropriation of Three Million United States Dollars by a group comprised mostly of United States citizens (Pistell, Vesco and others) (a) where the funds were misappropriated from a mutual fund (IIT) with over 300 United States fundholders, (b) where the cash to finance the misappropriation was on deposit in a United States bank and

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\* Indeed, if this Court were not to so treat this matter, it is difficult to comprehend how defendants Taylor, Murphy and Havens Wandless have standing to appeal since no injunctive relief was entered against them.

had been obtained from the sales in the United States of securities of United States companies by United States brokers through United States stock exchanges, (c) where the "cover" for the misappropriation was the purported purchase and sale of securities of a shell corporation formed by a United States lawyer and most of whose active officers and directors were United States citizens, which corporation had an office and place of business in the United States and was actively engaged in business in the United States, (d) where the negotiating and drafting of the "cover" documents took place to a significant degree in the United States between United States lawyers, (e) where a substantial portion of proceeds of the misappropriation was invested in the United States through United States brokers in securities traded on United States stock exchanges and (f) where much of the balance of the misappropriated funds was spent in the United States using checks drawn on a United States bank which were payable to persons, banks and governmental units in the United States?

2. Is the misappropriation and misuse of funds under the guise or cover of a securities transaction a violation of the securities laws of the United States?

3. Does an illicit transaction which violates the laws of every civilized nation violate the law of nations?

4. Can a District Court's issuance of a preliminary injunction after a comprehensive and contested hearing

on the merits, with live testimony, submission of documentary evidence and extensive participation, argument and briefing by counsel, be vacated and reversed on appeal where the appellants make no showing that issuance of the injunction was clearly erroneous?

5. Was it proper for the District Court to authorize, without an evidentiary hearing, the disbursement of \$40,000 from the treasury of a company which the District Court had previously enjoined from disposing of its assets and for which the District Court had appointed a temporary receiver, for an unspecified purpose purportedly in connection with the obtaining of a concession in The Cameroons when the receiver had not opined as to the merits of the disbursement and plaintiffs, for whose benefit the preliminary injunction had issued and the temporary receiver had been appointed, were not given the opportunity to examine into the merits of the disbursement by cross-examination or otherwise?

#### NATURE OF CASE

The complaint (A.8-29a)\* filed by the plaintiffs alleged jurisdiction based principally upon claimed violations of the Securities Act of 1933 and the Securities Exchange Act of 1934.

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\* References "A. -- a." are to the Joint Appendix.

Plaintiff IIT is a mutual fund organized under the laws of Luxembourg. IIT is presently in liquidation under the laws of Luxembourg. (A.1001-09a.) Plaintiffs Baden, Delvaux and Lecuit are IIT's Liquidators and are acting under the jurisdiction of the District Court of Luxembourg. (Ibid.) IIT was one of the mutual funds in the IOS complex which came under the control of Robert L. Vesco ("Vesco"), Milton F. Meissner ("Meissner"), Stanley Graze ("Graze"), Norman LeBlanc ("LeBlanc") and others.

The complaint alleges that pursuant to a conspiracy involving Vesco, Meissner, Graze, LeBlanc and others (a) millions of dollars of United States blue chip securities belonging to the "Dollar Funds,"\* including IIT, were sold in the United States securities markets; (b) that the defendant Pistell formed a shell company, the defendant Vencap, Ltd.; (c) that \$3,000,000 of the proceeds of the sale in the United States of the blue chip securities were transferred from the United States and put into the shell corporation, Vencap; (d) that IIT's \$3,000,000 "investment" in Vencap was a sham; (e) that in connection with IIT's sham investment of \$3,000,000 in the shell corporation, Pistell and Murphy produced and delivered to IIT's representatives a three-page memorandum which made material misstatements of

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\* Dollar Funds refer to mutual funds, including IIT, originated, controlled, operated and sold by IOS and entities within the IOS complex. The Dollar Funds primarily invested in United States securities.

fact and omitted facts necessary to make the facts stated therein correct and which was used to provide cover in furtherance of the fraud; and (f) that Pistell was aided in the foregoing by Murphy, Taylor and others. The complaint further alleges that the \$3,000,000 was used for the personal benefit of Pistell and others to the detriment of IIT and its fundholders.

The first cause of action claims violations of Section 17(a) of the Securities Act of 1933. The second cause of action claims violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder. The third cause of action claims violations of Section 352-c of the General Business Law of the State of New York. The fourth cause of action alleges common law fraud. The fifth cause of action alleges fraud and conversion. The sixth cause of action alleges corporate waste. The seventh and eighth causes of action allege breach of fiduciary obligations owed to IIT and its fundholders. The ninth cause of action alleges aiding and abetting securities law violations, fraud, breach of fiduciary obligations and waste of corporate assets. The tenth and eleventh causes of action allege failure to segregate IIT's funds and to see to it that they were used for the purposes stated in the three-page memorandum. The twelfth cause of action is for failure to disclose alleged violations of law to IIT, the Securities and Exchange

Commission, the United States Department of Justice and others.

The defendants have failed thus far to answer the complaint. The District Court assumed that the defendants who appeared were denying all of the material allegations in the complaint.

#### COURSE OF PROCEEDINGS

##### A. Prior Proceedings.

Plaintiffs commenced this action in the District Court on June 10, 1974 by the filing of a complaint. Plaintiffs moved by order to show cause for a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure and for the appointment of a receiver. Plaintiffs also moved for a temporary restraining order. Defendants Vencap, Intervent, Intercapital, Pistell, Taylor, Murphy, and Havens Wandless appeared on June 10, 1974 and the District Court, after reviewing the motion papers and hearing counsel, entered a temporary restraining order enjoining certain of the defendants from utilizing and exercising any control over the assets of IIT or the defendants Vencap, Intervent, and Intercapital.

The temporary restraining order was modified on plaintiffs' motion on June 14, 1974 to eliminate certain of the defendants.

Plaintiffs' motion for a preliminary injunction and for the appointment of a receiver was the subject of an evidentiary hearing in the District Court on June 14, 17, 18, 19, 20 and 21. Defendants Vencap, Intervent, Inter-capital, and Pistell appeared at the hearing by counsel and opposed the motion.

At the conclusion of an extensive and comprehensive contested hearing, the District Court granted plaintiffs' motion in all respects. The Court entered a preliminary injunction against Vencap, Intervent, Intercapital, and Pistell enjoining them from utilizing and exercising any control over the assets of IIT, Vencap, Intervent, and Intercapital, and appointed a receiver.

District Court Judge Charles E. Stewart, Jr. filed his findings of fact and conclusions of law on July 3, 1974 (A.947-70a). The findings of fact and conclusions of law were modified slightly on September 30, 1974 (A.971-72a).

On September 3, 1974, the District Court permitted Vencap to disburse \$40,000 of the funds which it had received from IIT in connection with obtaining a mining concession in The Cameroons (A.973-74a).

B. Scope of Evidentiary Hearings.

The District Court granted plaintiffs' motion for a preliminary injunction after an exhaustive and vigorously

contested hearing on the merits. The defendants availed themselves of the ample opportunity given them to present witnesses and documentary evidence. The issues were briefed and comprehensive oral argument was heard on June 24, 1974.

In addition to several days of live testimony from nine witnesses, the record in the District Court contains

(1) 81 pages of testimony of defendant Pistell given before the Securities and Exchange Commission on November 1, 1972 in the Matter of International Controls Corporation - Exhibit 15;

(2) 555 pages of testimony of Pistell given over five trial days in April 1973 in Securities and Exchange Commission v. Robert L. Vesco, et al., 72 Civ. 5001 (CES), U.S.D.C., S.D.N.Y.\* that testimony was introduced into evidence as Exhibit 12; and

(3) 331 pages of testimony of Pistell given on May 6 and 7, 1974 in a deposition in SEC v. Vesco, which is Exhibit 14.

Thus, the District Court had before it a total of almost 1,800 pages of testimony and over 120 exhibits, many of which had hundreds of pages. The matter was comprehen-

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\* Securities and Exchange Commission v. Robert L. Vesco, et al., is hereafter sometimes referred to as SEC v. Vesco.

sively presented, and District Court Judge Charles E. Stewart, Jr., reached a reasoned and correct result.

#### RELATED CASES

##### A. SEC Case.

The Vencap transaction is just one of the numerous facets of the mulcting of IIT and the other IOS Dollar Funds accomplished by Robert L. Vesco and his cohorts. According to the Securities and Exchange Commission:

"This case [Securities and Exchange Commission v. Robert L. Vesco, et al., 72 Civ. 5001 (CES) U.S.D.C., S.D.N.Y.] presents one of the most serious securities frauds ever perpetrated on public investors and, of course, for that reason it stands alone as one of the most important enforcement actions the Commission has brought." "POST TRIAL MEMORANDUM OF PLAINTIFF SECURITIES AND EXCHANGE COMMISSION IN SUPPORT OF A MOTION FOR A PRELIMINARY INJUNCTION AND ANCILLARY RELIEF" in Securities and Exchange Commission v. Robert L. Vesco, et al., 72 Civ. 5001 (CES) U.S.D.C., S.D.N.Y. at page 94.

##### B. Related Cases in the Southern District.

The numerous cases in the Southern District involving IOS and related entities, and Vesco and his associates are noted in Appendix A.

#### FACTS

##### A. Parties.

Plaintiff IIT is an International Investment Trust. It is an open-end mutual fund organized as a unit investment

trust under the laws of the Grand Duchy of Luxembourg (A.196, 1001-09, 1010-33a). IIT has in excess of 300 fundholders who are American citizens and/or residents. (A.1083-175a.)\* On December 18, 1973, the District Court of Luxembourg, first section, decreed IIT to be in liquidation and appointed plaintiffs Georges Baden, Jacques Delvaux and Ernest Lecuit as Liquidators for IIT ("Liquidators") and the Liquidators have been duly sworn. (A.286-87, 1001-09a.) IIT had been controlled by IOS, Ltd. (A.1015a) which was controlled by Robert Vesco and his associates. The appointment of the Liquidators freed IIT from Vesco's group.

Defendant Robert L. Vesco is an American citizen and was the Chairman of the Board of Directors of IOS, Ltd. (A.199a.) Defendant Milton F. Meissner is an American citizen and was President of IOS, Ltd. and President of IIT Management Company, S.A., the management company for IIT (A.200a). Defendant Norman LeBlanc was Executive Vice President of IOS, Ltd. (Ibid.). Defendant Stanley Graze

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\* The fact of 300 American fundholders in IIT is established by its fundholders' list which Judge Stewart admitted in evidence. (A.218, 220, 960, 1082-1175a.) Plaintiffs did not and do not rely upon the affidavit of Peter G. Wood (A.154-55a) which was not before the Court below when that Court issued its Opinion and Order. The Wood affidavit was not cited in the Proposed Findings of Fact and Conclusions of Law submitted by plaintiffs to Judge Stewart and was in no way relied upon by Judge Stewart. The defendants' querulousness regarding the Wood affidavit is directed to a nonexistent issue.

is a United States citizen and was President of IOS Management Services, Ltd. and its successor International Capital Investments (Sterling), Ltd. which were responsible for the investment management of all the IOS managed mutual funds, including IIT. (A.200-01a.)

Defendant Richard C. Pistell is a United States citizen who claims to reside in Lyford Cay, Bahamas. (A.1662, 3883a.) Pistell is (a) Chairman of the Board of Directors, President and Treasurer of Vencap and the owner of 50% of the ordinary stock of Vencap; (b) President and sole Director of Intervent; (c) owner of 50% of the stock of Intercapital; and (d) owner of 50% of the stock of Conservative Capital, Ltd. ("Conservative Capital"), a corporation strikingly similar to Vencap. (A.245, 548, 555, 569, 1186, 1192, 1194, 1708-14, 2113, 2131-33a.) Pistell maintains an office for the transaction of business at 99 Park Avenue, New York, New York. (A.605, 1663-64, 2113a.) Defendant Walter Blackman ("Blackman") is a resident of the Bahamas, and Pistell's partner in Vencap, Conservative Capital, Intervent and Intercapital. (A.548a.)

Vencap is purportedly a Bahamian corporation\* with

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\* Vencap claims to be "a non-resident Bahamian company formed under The Companies Act of the Bahamas and designated as such in accordance with Section 41(2) of the Exchange Control regulations of the Bahamas. Exchange Control permission for the incorporation of the Company and the issuance

offices in the Bahamas and at 99 Park Avenue, New York, New York. (A.605, 1193, 603-04, 1663-64, 2827-28, 2833, 2835-38, 2840, 2843, 2853-54, 2871, 2927, 2932-39, 2942-43, 2945, 2953, 2964-67, 2977, 2990-91, 2994-96, 3002-07, 3014, 3020-21, 3030-31, 3033-35, 3040, 3044-46, 3048, 3061, 3063-67, 3075-78, 3086-87, 3090, 3149, 3176, 3180-82, 3184, 3186, 3188, 3193, 3195, 3197-205, 3209, 3223-28, 3238-40, 3258, 3260, 3269a.)

Intervent is a Delaware corporation with offices in Midland, Texas and at 99 Park Avenue, New York, New York. (A.603-05, 1663-65a.) Intervent is a wholly-owned subsidiary of Vencap. (A.521a.)

Intercapital, owned in equal shares by Pistell and Blackman, is purportedly a Netherlands Antilles Corporation with offices in Curacao and at 99 Park Avenue, New York, New York. (A.603-05, 1663-64, 3283-86, 3382, 3384, 3393, 3396-402, 3404-10, 3412-19, 3423-27, 3431, 3434-37a.) Intercapital has no officers or directors. (A. 564a.)

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of shares under Regulation 8 has been obtained from the Bahamian Monetary [sic] Authority." (A.967a.)

It should be noted that a non-resident Bahamian Company is not allowed to conduct any local business beyond that which is necessary to its presence in the Bahamas such as leasing office space, hiring employees, subscribing for telephone service, etc. The business of a non-resident Bahamian company should not be concerned with Bahamian entities or Bahamian assets. Business should only relate to foreign entities and foreign assets or other non-resident Bahamian companies and their assets. See generally, Bahamian Exchange Control Regulations.

David Taylor (a) is a member of the Bar of the State of New York; (b) is a partner in Havens Wandless; (c) is an officer of Vencap, i.e., Assistant Secretary; (d) was the sole incorporator of and is the Secretary of Intervent; and (e) is attorney-in-fact for Pistell. (A.500, 1701, 2105, 2113, 3990-91a.)

Murphy (a) is a member of the Bar of the State of New York; (b) is a partner in Havens Wandless; (c) is attorney-in-fact for Pistell; (d) is a Director and Secretary of Vencap; and (e) is a business executive. (A.483, 1186, 1192, 1196, 3990-91a.)

Havens Wandless is a law firm. Havens Wandless, Taylor and Murphy maintain offices for the transaction of business at 99 Park Avenue, New York, New York.

B. IIT's Investment Policy.

IIT advertised to its fundholders that it had a "prudent investment policy". (A.1014a.)

C. Pistell Serves Vesco.

Pistell and Havens Wandless had a history of dealing with defendants Vesco, Meissner, LeBlanc and Graze from the beginning of 1972. In fact, contrary to the assertions of the defendants, the Vencap transaction and fraud were not a one-shot, isolated deal with the IOS group, but rather represented the culmination of a long series of associations,

negotiations and deals involving Pistell and the Vesco group, including activities involving Conservative Capital (A.3887-889a), Paradise Island (A.1315, 3916a), a Moroccan resorts transaction (A.3914, 3916a) and oil pipelines and cattle ranches in Costa Rica. (A.3929-33a.)

Pistell first met Vesco in January or February, 1972 at the Metropolitan Club in New York. (A.1285, 3904a.) Thereafter Pistell worked closely with Graze in Nassau in connection with the sale of a resort named Paradise Island by Resorts International, Ltd. to the IOS Group. At the same time he met defendants Meissner and LeBlanc who with Graze were representing the IOS Group in the purchase. (A.3889-94a.) This proposed multi-million dollar transaction was sloughed off in the defendants' briefs by calling it an "unrelated matter." See, e.g., Brief of Murphy, Taylor, Havens Wandless at pp. 11-12.

In March 1972 Pistell met Graze at the headquarters of International Controls Corporation in Fairfield, New Jersey to discuss, inter alia, one of his "investments" called Conservative Capital, involving assets of one of the other IOS Dollar Funds - Fund of Funds, Ltd. (A.3894, 3898a.)

Thereafter, in late spring 1972, Pistell went to Costa Rica. He found that the "climate" was to his liking. He thought Costa Rica would also be amenable to Vesco. (A.1312-14, 3920-38a.)

Pistell introduced Vesco to Costa Rica and its president, Jose Figueres in late June 1972. (A.1310, 1316a.) He recalled that "Mr. Vesco was interested in relocating the headquarters of the IOS complex that had been in Switzerland and France." (A.1312-13a.) Pistell knew that Vesco was interested in a central location for his operation and that he was also interested in investing in the Caribbean area, but wished his operation to be on the "mainland", rather than "isolated on an island." (A.1313a.)

Pistell's interest in Costa Rica had been aroused by one Clovis McAlpin, who had his headquarters there. (A.1311-12a.) Pistell's impressions of the country were most favorable. (A.1313-15a.) Pistell had been informed by McAlpin that Sociedad Agricola y Industrial de San Cristobal S.A. ("San Cristobal") was looking for financing. (A.1575a.) Pistell was asked by the Costa Rican President's son - Jose Marti Figueres ("Marti Figueres") - to seek financing for San Cristobal (A.1576a), a company which was 60% owned by the Figueres family. (A.1577-78a.) McAlpin's Capital Growth Real Estate Fund owned the remaining 40% of San Cristobal. (A.1578a.) Upon his return from Costa Rica Pistell informed Vesco that San Cristobal was looking "for a couple of million dollars financing"; that the Figueres family owned an interest in the company; and that the company "deserved merit." (A.1577a.)

Vesco's response to Pistell's report on Costa Rica was "It sounds like just the ticket and we'll go down and take a look at it." (A.1315a.) Thus began the episode which proved so fateful for investors in the Dollar Funds.

On June 29, 1972, Vesco - accompanied by his wife - took Pistell and Howard Cerny, one of Vesco's New York attorneys, on a flight from Nassau to Costa Rica on the Boeing 707 leased by International Controls. (A.1310-11a.) The purpose of the trip, as Pistell testified, "was to introduce Mr. Vesco and his wife, and Mr. Cerny was along with us, to Costa Rica, to the people in the Government of Costa Rica and the various people in business in Costa Rica." (A.1310a.) This Pistell did. After arrival, Pistell introduced Vesco to McAlpin, to Marti Figueres and then, through Marti Figueres, to President Figueres himself. (A.1316-17a.) A major topic of discussion was Vesco's plan for an international financial district. (A.1317a.) Pistell recalled that at Vesco's "official visit" to President Figueres at his residence (A.1317a):

"Mr. Vesco said that on behalf of himself and a group that he was advising that they were looking for a new headquarters, to relocate, that he was very interested in under-developed countries, that his real interest, if he could possibly work it out, would be to set up a new international banking zone that would be open to the world, which would enable people and companies to come and do banking in that country, or wherever it was."

Also during this first visit by Vesco to Costa Rica, Vesco visited the site of San Cristobal, accompanied by Pistell, Marti Figueres and two or three members of the San Cristobal staff. (A.1320a.) There was discussion of an investment in the company, which was seeking about \$2,500,000 purportedly to expand in the low cost housing field. (A.1321a.) Pistell testified on this subject (Ibid.):

"Q What did Mr. Vesco say about this needed financing?

A He said that it was all very interesting to him and that he would call and get in touch with the necessary people that would come down and take a look at the plant and the facilities, because he was not an engineer, he did not know housing and machinery and all that, and have them come down and take a look at the investment.

Q Did he name the necessary people?

A Yes. He wanted Dr. Meissner mainly to come and take a look at it.

Q Did this occur?

A Yes. Dr. Meissner did come down to Costa Rica."

Meissner arrived in Costa Rica directly from the annual shareholders' meeting of IOS, which was held in Canada on June 30, 1972. With the engineers he inspected the San Cristobal operations. (A.1322a.) Graze followed upon the heels of Meissner and examined not only the San Cristobal factory, but also "the banking system. . . the balance of payments. . . the agricultural product balance and deficits."

(A.1323a.) By this time - July 8th (A.1326a) - Pistell had left Costa Rica, and he later heard that an agreement in principle for the financing of San Cristobal had been reached. (A.1323-26a.)

The party supplying the financing to San Cristobal was IIT.

Pistell claims to have received from San Cristobal \$150,000 as a finder's fee for arranging the financing.

(A.1329a.) He received a check for that amount after the closing of the financing at Bahamas Commonwealth Bank (A.1327-29a), and paid \$50,000 to Joseph Burke, who had originally introduced him to McAlpin. (A.1311, 1329a.)

The briefs of the defendants contend that Pistell was barely involved with Vesco and his associates - an inaccurate assertion, in view of Pistell's history of involvement with Vesco.\*

D. The Theft.

In June 1972, Taylor formed Vencap, at the behest of Pistell. (A.3916-17a.) Pistell initially wanted Leland Rosenberg, a "financier" of unusual background, to be his partner in Vencap, but Rosenberg was unavailable. (A.1731-35a.) Rosenberg, like Pistell, has a Vesco connection. He was responsible for setting up a Panamanian shell company for Howard Cerny, a Vesco attorney and aide. (A.1841a.)

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\* The involvement is continuing. Pistell saw Vesco in Costa Rica shortly before this action was commenced. (A.1755a.)

Pistell then tried to obtain Ahmed Ben Hima, a Moroccan national, as his partner but Ben Hima was also unavailable. (A.1855-60a.) Pistell finally settled for "Count" Amoury de Reincourt ("de Reincourt").

Pistell and de Reincourt each received 2,000 shares of Vencap common stock for \$2,000. (A.1194a.) De Reincourt later disassociated himself from Vencap because of adverse publicity caused by Vencap's connection with Vesco and Vesco's associates. (A.799-01a.) Blackman, in May 1973, was installed as owner of 50% of the ordinary shares of Vencap. (A.1194a.) The Rosenberg to Ben Hima to de Reincourt to Blackman travel of the "other" 50% of the Vencap common shares might lead a reasonable person to conclude that there was a "straw man" somewhere in the haystack. Pistell's insistence that he did not agree to sell his Vencap interest to Blackman for \$5,000 (Pistell Brief, pp. 24-25), but that only Blackman signed such an agreement is quite persuasive as evidence for the proposition that Vencap in its entirety is a sham and that Rosenberg, Ben Hima, de Reincourt and Blackman are phantoms.

In July 1972, Pistell paid \$10,000 to Vesco, utilizing Vencap funds, by check signed personally by Pistell. (A.764-66, 2827a.)

Vencap was organized for Pistell's benefit under the guise of a venture capital company. He initially put

in \$100,000 from a \$150,000 finder's fee he received from Vesco on the San Cristobal financing. (A.797a.) Pistell, however, needed a much bigger stake for his plans. Pistell told Graze about Vencap in August 1972, when IOS - Paradise Island negotiations were still going on. (A.1288-93, 3920a.) Thereafter events moved rapidly.

On August 31, 1972, Vencap's shareholders authorized the issuance of 30,000 redeemable preference shares, par value U.S. \$100, which had no vote, were to be given a six percent noncumulative dividend only when and as declared by the board of directors, were to share in one-third of the net earnings of Vencap when and as declared by the board of directors (the preference shares were not represented on the board of directors) and were redeemable at par plus six percent for the elapsed portion of the year of redemption. (A.1184-85a.) Pistell left the form of IIT's participation in Vencap to his attorneys, Havens Wandless. The terms and conditions of the preference stock were formulated, drafted and negotiated by Taylor in New York after Pistell and Graze agreed on broad outlines. (A.1366, 1825-27a.) Taylor was the author of the terms and conditions of the Vencap preference shares as shown by his initialed draft. (A.4155a.)

The Vencap preference shares, concocted and drafted in New York by Pistell and his counsel, thus became the

specific vehicle for providing the funds fraudulently misappropriated by Pistell. IIT funds were put into Pistell's company, and in exchange therefor preference shares were issued. These shares were redeemable for a maximum of \$3,180,000 (that is, assuming Pistell chose to redeem the shares at the end of a year) (A.302-04a); if he decided to redeem on January 2 of any year, IIT would get 2 days interest, or \$1,000). A maximum "profit" of \$180,000 was provided for IIT on its \$3,000,000 "investment" no matter how many millions Vencap might earn. (A.766-67a.)

If Pistell's misappropriations and self-dealing prevented profit and resulted in losses, there would be no satisfaction to the buyer of the preference shares. Thus, the most IIT could expect would be to finance Pistell's thefts and extravagances, while according him all profits, if any resulted, with the maximum expectation of recouping from Vencap only the initial \$3,000,000 plus a miniscule maximum of only one year's or a part of a year's six percent interest. The "investment" was a perpetual interest free loan on a "heads-I-win, tails-you-lose" basis.

In September 1972, Murphy prepared a memorandum setting forth the terms of the arrangement whereby IIT would transfer \$3,000,000 to Vencap in exchange for its redeemable preference shares. (A.667, 1350-51, 1814-16a.) Havens Wandles sent this "three-page memorandum" to Graze. (A.1350-51, 1815-16a.)

The purpose of the "three page memorandum" was to give an aura of legitimacy to the transaction. (A.961, 1655-57a.)

On September 29, 1972, the illicit scheme was furthered when Vencap and IIT entered into an agreement whereby Vencap would sell 30,000 preference shares and warrants to purchase an additional 30,000 preference shares to IIT for \$3,000,000. This agreement was signed by Meissner on behalf of IIT Management Company, S.A. and by Pistell on behalf of Vencap. (A.1605-06a.)

Defendants go to great lengths to obfuscate the origin, drafting and transmission of the purchase agreement, the terms and conditions of the preference shares and the "three page memorandum." The statement of facts given above relies heavily on testimony taken before this case was commenced. It would unduly burden this brief to enumerate all the differences between Pistell's testimony prior to the commencement of this action and defendants' testimony given in the District Court in this case. See, for example, A.770-78, 783-86.

The closing was held in Nassau Bahamas in October, 1972. (A.506a.)

The tie-in of the \$3,000,000 to Pistell's prior associations with Vesco and his associates and IOS was unmistakable. First there was Pistell's \$100,000 emanating from Pistell's Vesco-related Costa Rican finder's fee which

he put into Vencap. Next, there were the continuing contacts with Graze in 1972, which resulted in Graze ordering the sale of more than \$121,000,000 of United States securities owned by IIT, with the sales made on United States exchanges by brokers who were members of the New York Stock Exchange and other principal exchanges. Those sales were made in specific conformity with advice given Graze by Pistell in 1972.

The \$3,000,000 used to purchase the Vencap preference shares came from the sale of IIT's United States blue chip securities by American National Bank & Trust Company (herein "ANBT") of Montclair and Morristown, New Jersey. (A.420, 470, 477, 4104-10a.) Pistell now claims that he did not know the source of the \$3,000,000. Pistell advised Graze to sell the portfolio of United States securities. (A.1821a.) Anyone as sophisticated as Pistell would have to know that the funds required to finance this and other Vesco escapades would require more ready cash than IIT had on hand. (A.1034a.) Finally, Graze told Pistell that he had liquidated the securities into cash. (A.1821a.). The record does not seem to bear out defendants' present contentions of ignorance as to the source of the \$3,000,000.

ANBT was the custodian for IIT's United States securities. (A.417-18, 474a.) IIT eventually sold

substantially all of IIT's United States securities. (A.4046-103a.) ANBT sold IIT's United States securities through designated brokerage houses in New York as directed by IIT. (A.418-19a.) The proceeds of such sales of securities were paid into ANBT's account at the Chemical Bank in New York and then transferred to ANBT in New Jersey. (A.419a.) Overseas Development Bank (Luxembourg) ("ODB(Lux)") was the cash depository for IIT and had an account at ANBT. (A.459a.) Bahamas Commonwealth Bank ("BCB") also had an account at ANBT. (A.420a.)

Pursuant to the instructions from IIT, ANBT transferred \$3,000,000 from the sale of United States securities from the ODB(Lux) account at ANBT to the BCB account at ANBT, and then to BCB in the Bahamas earmarked for Vencap. (A.477, 4104-10a.)

ANBT received the certificate evidencing IIT's "ownership" of 30,000 shares of Vencap preference shares and warrants for 30,000 additional Vencap preference shares, and kept the certificate and warrants in IIT's securities custodial account at ANBT in New Jersey. (A.451-56a.)

Following the closing, Vencap invested a substantial part of the \$3,000,000 in United States securities. (A.1411, 1940-41a.) These securities purchases were made through Loeb, Rhoades & Co., 42 Wall Street, New York, New York, Philips, Appel & Walden, Inc., 111 Broadway, New York,

New York, Gilligan, Will & Co., 22 Thomas Street, New York, New York, Ernst & Co., 120 Broadway, New York, New York, and Anderson & Strudwick, 40 Wall Street, New York, New York, all United States stock exchange member firms or affiliates of member firms. (A.2185-368a.) Purchased were shares of corporations listed on the New York Stock Exchange and American Stock Exchange, such as Lincoln American Corp., Bausch & Lomb, Recrion Corp., American Broadcasting Corp., etc. (A.4149-50a), which were corporations registered with the Securities and Exchange Commission pursuant to Section 12(g)(8) of the Securities Exchange Act.

The sham and fraud aspects of the Vencap transactions were further highlighted in mid-1973 when Pistell agreed to sell his ordinary shares of Vencap to LeBlanc at cost (\$2,000) and caused the certificates for his shares to be deposited at BCB. (A.1794, 1869a.) Clearly Vencap was nothing of any value, notwithstanding its grandiose posture, since Pistell's interest was saleable for \$2,000. Although without intrinsic value as a business entity, Vencap was an unparalleled vehicle for Pistell's misappropriations. He used Vencap as his "personal checkbook". (A.1836-37a.) He went so far as to cause Vencap to pay more than \$10,000 in alimony payments to his ex-wife (A.3963a) and to pay more than \$2,000 for the telephone bills of his present wife. (A.798-99, 4148a.)

E. Disposition of the Swag.

Except for \$4,000 paid in by Pistell and Blackman, the capital of Vencap was provided by IIT's \$3,000,000. Intervent and Intercapital had no funds other than moneys obtained by or through Vencap.

(i) Loans to Pistell.

After Pistell and Vencap "sold" the preference shares to IIT for \$3,000,000, Pistell misappropriated \$590,000. Vencap deposited \$600,000 in Handelskredit Bank, a "private" Swiss bank, for which Vencap received a certificate of deposit. (A.1649, 1739a.) Pistell caused Inter-capital to borrow \$590,000 from Handelskredit Bank (A.1641, 3994a), which, in turn, loaned the \$590,000 to Pistell. (A.3988a.) Vencap pledged its \$600,000 certificate of deposit to Handelskredit Bank as collateral for Inter-capital's loan from Handelskredit Bank. (A.1649, 3993a.) In addition, Pistell pledged to Handelskredit Bank his interest in Pomaikai Oil Company which was subsequently merged with Flag-Redfern Oil Company as collateral for the loan to Intercapital. (A.1645-48, 1739, 3993a.) Pistell gave Vencap an option to purchase ten percent of his interest in Flag-Redfern Oil Company which had already been pledged to Handelskredit Bank. (A.1651-653a.) In the event of a default by Pistell on the payment of his loan from Intercapital,

Intercapital would default on its loan from Handelskredit Bank. (A.589a.) Vencap, thus, had no security for its indirect loan to Pistell. (A.1787, 1787-1, 1787-2a.)

Pistell used the \$590,000 which he "borrowed" from Vencap, through Intercapital, to pay his State and Federal income taxes, to pay outstanding loans from the Chemical Bank, the Bowery Savings Bank and Franklin National Bank and to satisfy a judgment entered against him. (A.3387, 3389, 4146a.) Prior to Pistell's payment of his past due Federal taxes, the United States had a lien against all of Pistell's personal and real property. (A.1836-37a.)

In December 1973, Pistell repeated his misappropriation. He borrowed \$55,000 of Vencap's funds from Intervent. (A.2146a.) There is no collateral for this loan but Pistell has claimed that if this loan is not repaid by the end of calendar year 1974, Pistell would give Intervent a mortgage on his home in the Bahamas which was purchased with IIT's money. (A.538a.)

Thus, Pistell's misappropriations-by-loans totalled \$645,000.

(ii) Pistell's Compensation.

Pistell provided himself with continuing access to IIT's money through Vencap, in addition to his huge and unreal "loans" from Vencap. In March 1973, Vencap entered into an employment agreement with Pistell which provided

that Pistell's compensation would be \$60,000 per annum salary, plus fifteen percent "off the top" of any profits earned by Vencap and a house in the Bahamas costing \$150,000. (A.1962-69a.) Pistell's home in the Bahamas was purchased by Vencap at a cost of \$162,546.05. (A.3963-64a.)

According to Pistell's own accountants, Field, Tiger, Krell and Werber of Great Neck, Long Island, from the founding of Vencap through April 30, 1974, Pistell received "compensation" (salary and advances) of \$356,640.62. (A.4963-64, 4148a.) Before Judge Stewart stopped the nonsense -- and using Pistell's own accountant's allocations and characterizations -- Pistell was being compensated at the rate of \$17,000 per month!!!

From the founding of Vencap through April 30, 1974, Vencap, Intervent and Intercapital have paid to Pistell as salary, advances and loans \$1,001,640.62. (A.4148a.)

(iii) Expenses.

Expenses were still another lucrative source of funds for Pistell. From the founding of Vencap through April 30, 1974, Vencap paid

1. \$58,179.87 in "travel and expenses."
2. \$35,034.56 in "transportation" expenses.
3. \$25,838.98 in telephone bills, office expenses and American Express charges.

4. \$26,515.35 in miscellaneous expenses.

5. \$309,252.19 in professional fees. (A.4148a.)

Havens Wandless has received \$241,255 from Vencap during its short existence. (A.3452, 3463, 4119-120, 4122-126, 4128-4129, 4133-134, 4137, 4140, 4146a.)

(iv) Total payments to Pistell .

From the founding of Vencap through April 30, 1974, Vencap, Intervent and Intercapital disbursed \$1,456,461.57 for and to Pistell as salary, advances, loans and expenses. (A.4148a.)

(v) Securities Losses.

In the months of September, October and November, 1972, Vencap purchased in United States securities markets more than \$835,000 of publicly traded, listed and registered United States securities. (A.4149a.) These purchases conflicted with the purported sophisticated venture capital program Vencap advertised for itself (and were squarely contrary to the advice Pistell said he was giving to Graze). (A.1308a.) Of the \$835,000 invested in publicly traded United States securities, \$672,000 was invested in Lincoln American Corp., the company Pistell had been running prior to the start up of Vencap. (A.4149a.) This stock is still held by Vencap and Vencap has an unrealized loss of \$340,000 on the investment. (A.4153a.)

Vencap has incurred realized losses of \$109,645.30 and unrealized losses of \$331,969.38 on its dealings in securities up to April 30, 1974. (A.1871, 4149-53a.)

(vi) Vencap's Record.

From the founding of Vencap up to April 30, 1974, a period of one year and seven months, or a total of 19 months, approximately \$1,898,000 was dissipated as compensation, salary, loans, advances, expenses and losses on securities. (A.4148, 4149-53a.) THE GROSS OUTFLOW PRIOR TO JUDGE STEWART'S INJUNCTION WAS AT THE RATE OF \$100,000 PER MONTH!!

(vii) Vencap is for Pistell; Pistell is for Pistell.

The evidence that the defendants thought of Vencap as a mere extension of Pistell was the cavalier disregard that Pistell had when it came to obtaining the Board's authorization for major expenditures incurred by Vencap on behalf of companies in which Pistell had an interest. (A.1240-78a.)

There was no record in the minutes that Pistell disclosed his interest in Flag-Redfern Oil Company (A.638-39a), or his ownership of Conservative Capital (A.640a), or Pistell's and Blackman's interest relating to Vencap's option to purchase Chibex stock from Conservative Capital (A.642-43a), or Vencap's loan to Chibex of \$400,000 (A.645a), or the put option from Fund of Funds, Ltd. (A.654-56a), or the fact the \$590,000 of Vencap assets would be loaned to Pistell (A.1240-78a).

These illegalities are in direct contrast to Pistell's ability to "document" other steps. When it became necessary to retroactively designate \$100,000 of Pistell's \$150,000 San Cristobal finder's fee as a loan from Pistell to Vencap, there is explicit reference to that in the minutes. (A.1252-54a.)

#### ARGUMENT

#### POINT I

#### THE COURT BELOW HAD SUBJECT MATTER JURISDICTION UNDER THE SECURITIES LAWS OF THE UNITED STATES

The defendants are just plain wrong in their assertions that the District Court did not have subject matter jurisdiction over the violations of the federal securities laws alleged and established by the plaintiffs.

Here, we are dealing with acts, practices and a course of business engaged in by Pistell, his coterie and his IOS "friends" over a period of many months. That course of business involved the formulation, development, implementation and consummation of devices, schemes and activities to defraud IIT and its fundholders.

The elements necessary for subject matter jurisdiction have been variously stated by this Circuit and other

circuits, as well as by lower courts. The facts in this case, fully supported in the record, demonstrate beyond doubt the existence of subject matter jurisdiction.

The two key elements separately supporting subject matter jurisdiction in this case are: First, significant and substantial conduct in the United States related to the violative acts, practices and transactions comprising the fraud; second, impact upon securities markets in the United States.

These two elements are directly derived from the two leading decisions on subject matter jurisdiction in this Circuit, Schoenbaum v. Firstbrook, 405 F.2d 200 (2d Cir.), rev'd in part on other grounds, 405 F.2d 215 (2d Cir. en banc, 1968), cert. denied, sub nom., Manley v. Schoenbaum, 395 U.S. 906 (1969), and Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972).

In Schoenbaum, this Court held (supra, at p. 206) that "Congress intended the Exchange Act to have extra-territorial application in order to protect domestic investors who have purchased foreign securities on American exchanges and to protect the domestic securities market from the effects of improper foreign transactions in American securities."

This Court then made explicit that there is subject matter jurisdiction over violations outside the United States involving United States listed and registered securities and the interests of United States investors (Schoenbaum, supra at p. 208):

"We hold that the district court has subject matter jurisdiction over violations of the Securities Exchange Act although the transactions which are alleged to violate the Act take place outside the United States, at least when the transactions involve stock registered and listed on a national securities exchange, and are detrimental to the interests of American investors."

In the present case, the violations involve both transactions within the United States embracing millions of dollars of registered and listed securities on the New York Stock Exchange and other exchanges, and clear detrimental impact on American investors. The sale of more than \$121,000,000 of United States securities, the use of \$3,000,000 of the proceeds of such United States sales to purchase Vencap preference shares and the subsequent purchase of United States securities by Vencap demonstrate that subject matter jurisdiction exists here within Schoenbaum, supra.

Schoenbaum dealt with conduct outside the United States and consequences on securities listed and negotiated on a United States exchange. In Leasco, supra, this Court was concerned particularly with conduct within the United

States. It referred to "fraud . . . practiced in this country," indicating that the key jurisdictional basis is conduct in the United States (supra, at p. 1334):

"Conduct" within the territory alone would seem sufficient from the standpoint of jurisdiction to prescribe a rule. It follows that when, as here, there has been significant conduct within the territory, a statute cannot properly be held inapplicable simply on the ground that, absent the clearest language, Congress will not be assumed to have meant to go beyond the limits recognized by foreign relations law." (Court's emphasis)\*

Here, as in Leasco, there is no need for any "justification for going beyond Schoenbaum" (p. 1334) since there were activities in the United States, and the Southern District in particular, which constitute a fraud "practiced in this country" (p. 1334). Witness, for example, the sales and purchases of listed and registered securities in the United States and formulation, implementation and consummation of the Vencap fraud resulting from activities of Pistell and his associates from offices in the Southern District of New York.

In fact, the concoction and drafting of the documents in the Southern District are enough under Leasco, but when viewed in the light of the overall fraud and actions in the United States and the origin, purpose and use of the three-page memorandum, Leasco is conclusive (supra, p. 1337):

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\* All emphasis herein is added unless otherwise noted.

"... While, as earlier stated, we doubt that impact on an American company and its shareholders would suffice to make the statute applicable if the misconduct had occurred solely in England, we think it tips the scales in favor of applicability when substantial misrepresentations were made in the United States."

In this case the scales should topple, not just tip, in view of the extensive conduct of Pistell and other defendants in the United States.

Pre-Leasco cases in the Southern District also support subject matter jurisdiction here consistent with the elements of United States conduct and impact on United States securities markets: Finch v. Marathon Securities Corp., 316 F.Supp. 1345 (S.D.N.Y., 1970) (no jurisdiction because of insufficient contacts in the United States); and Manus v. The Bank of Bermuda, CCH Fed. Sec. L. Rep. ¶93,299 (S.D.N.Y., 1971) (no jurisdiction because a foreign transaction and no detrimental effect upon United States investors or securities markets). See also, Kook v. Crang, 182 F. Supp. 388 (S.D.N.Y. 1960) and Ferraioli v. Cantor, 259 F. Supp. 842 (S.D.N.Y. 1966).

Recent decisions in the Southern District have reiterated the criteria for subject matter jurisdiction. See Selzer v. The Bank of Bermuda, Ltd., U.S.D.C., S.D.N.Y. (November 21, 1974), CCH Fed. Sec. L. Rep. ¶94,876 at p. 96,996 ("The Securities Exchange Act is applicable to securities transactions where (1) there is some significant connection in the violations with the United States, and (2)

the effects of the violations are detrimental to American investors") and Bersch v. Drexel Firestone, Inc., CCH Fed. Sec. L. Rep. ¶94,889 (S.D.N.Y., 1974) at p. 97,026; on appeal to the Second Circuit, Docket No. 75-7038 ("The crux of the jurisdictional basis in Leasco was the finding of 'significant conduct within the territory'. . . . A second element integral to the finding of jurisdiction here is the impact which the transaction in question had upon American investors and the American securities market."). See also Garner v. Pearson, 374 F. Supp. 591, 598 (M.D. Fla. 1974) (there is subject matter jurisdiction if "substantial misrepresentations were made within the United States, and the impact of the fraudulent scheme was felt within the United States").

The Eighth and Ninth Circuits are in accord. See Securities and Exchange Commission v. United Financial Group, Inc., 474 F.2d 354, 356-57 (9th Cir. 1973) ("In this case, focus should be upon appellants' activities within the United States and the impact of those activities upon American investors."); and Travis v. Anthes Imperial Limited, 473 F.2d 515, 524 (8th Cir. 1973) ("In our view, subject matter jurisdiction attaches whenever there has been significant conduct with respect to the alleged violations in the United States").

Vencap itself is to be considered as a United States corporation conducting its activities in the United

States under the securities law, and thus the violations involving Vencap even more clearly support subject matter jurisdiction. As noted in a recent commentary, Mizrack, Recent Developments in the Extraterritorial Application of Section 10(b) of the Securities Exchange Act of 1934,

30 THE BUSINESS LAWYER 367, 381 (1975):

"Several rules promulgated by the SEC pursuant to the Act with respect to foreign issuers contain what might be termed a limitation on the definition of a foreign corporation. Thus, the exemptions with respect to sections 12, 14 and 16 of the Act do not apply in any case where residents of the United States, directly or indirectly, hold more than 50 percent of the outstanding voting securities and the issuer's business is 'administered principally in the United States,' or in the alternative, one-half or more of its board of directors are residents of the United States. This limitation as to who might qualify for the exemption was obviously included to insure that U.S. residents cannot circumvent the requirements of the securities acts through use of foreign corporations. Supposedly, if these limitations are exceeded, the fact of foreign incorporation would be ignored." (footnote omitted)

This "non-resident" of the Bahamas is legally and factually a resident of the United States.

The District Court in SEC v. Vesco, the landmark United States securities law enforcement action, relied upon acts in the United States in finding subject matter jurisdiction. There District Court Judge Stewart ruled:

"A lot has been written and said to me about jurisdiction -- jurisdiction of a subject matter, personal jurisdiction. I don't find that these are easy issues to deal with. They obviously raise lots of complex, difficult problems, especially taking into account the fact that we start with the fact that many of the corporate

entities and some of the individuals are not American citizens and many of the most significant transactions occurred abroad.

"It seems to me, however, that there is jurisdiction of the subject matter; there were acts which occurred in this country which were fraudulent in nature.

"You will bear in mind from what I said a moment ago I am not making any final determination; I am making the determination I need to make now and in this connection with the facts that occurred here I start with the various events and transactions involving ICC which was, of course, the beginning -- perhaps you might say the nexus -- of the events involved in this lawsuit.

"Moreover, it seems to me that events had occurred abroad which had a substantial adverse impact on the United States, on the United States securities markets, on the United States investors.

"In short, I think that jurisdiction of the subject matter is apparent here, and I believe that this conclusion as to jurisdiction follows from the Schoenbaum case and the other cases which come down from Schoenbaum -- Travis, United Financial, Leasco. I don't think that I have to reach out here to find jurisdiction of the subject matter. Equally with respect to personal jurisdiction; as to some defendants whose acts were committed here.

"As to those and other defendants, it is my view that acts were performed outside the United States which had an adverse impact here and which impact was reasonably foreseeable."  
Transcript, September 11, 1973, at pp. 6-7.

A. Significant Conduct and Activities Within the United States

As more fully stated in the recitation of the facts, numerous acts in furtherance of the fraud and violations of the securities laws of the United States occurred within the United States and within the Southern District of New York:

1. Pistell, Taylor, Murphy, Vesco, Meissner and Graze are United States citizens.

2. Pistell, Vencap, Intervent, Intercapital, Taylor, Murphy and Havens Wandless maintain offices in the Southern District of New York.

3. Vencap, Intervent and Intercapital have an office in the Southern District of New York and are run out of the office in the Southern District of New York.

4. After receiving advice from Pistell, IIT sold \$121,002,000 worth of "blue chip" United States securities over the New York Stock Exchange and other United States exchanges through exchange member-firm brokers in the Southern District of New York.

5. The "blue chip" United States securities owned by IIT had been kept by ANBT in New Jersey.

6. ANBT (from its New Jersey offices) deposited the proceeds of the sale of IIT's United States securities in ANBT's account at Chemical Bank in the Southern District of New York.

7. Pistell participated in meetings in the United States with Vesco and his associates and with Taylor and Havens Wandless.

8. Significant elements of the Vencap "paper work", including agreement drafting and the negotiation, preparation and dissemination of the three page memorandum, were

performed by Taylor and Havens Wandless, with Pistell and others (including IIT's then counsel) in the Southern District of New York.\*

9. The terms and conditions of the Vencap preference shares "sold" by Vencap and Pistell to IIT, were formulated and drafted to a significant degree by Taylor and Havens Wandless in the Southern District of New York.

10. Vencap, upon receipt of IIT's \$3,000,000, used substantial portions in the Southern District of New York to purchase New York Stock Exchange listed securities and other securities listed on United States securities markets.

11. Approximately twenty-five percent of the \$3,000,000 proceeds to Vencap from the "sale" of its preference shares to IIT, was misappropriated by Pistell, and the misappropriations were effected in the Southern District of New York by checks issued by Taylor and Pistell from proceeds that were on deposit in a New York bank.

12. The Vencap preference shares were deposited by IIT for safekeeping with ANBT in New Jersey.

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\* Even if all of the negotiations and paper work had occurred a few miles off the coast, as defendants contend, the remaining jurisdictional facts in this case are overwhelming and the District Court would nevertheless have jurisdiction. Trying to put the Gulf Stream between this transaction and the securities laws is analogous to putting the camel through the eye of a needle.

B. Impact on United States Securities Markets.

The defendants' securities laws violations are replete with effects upon the United States securities markets.

1. The sale of more than \$121,000,000 of listed and registered United States securities through orders placed with exchange member-firm brokers and affiliates in the Southern District of New York had an effect on the United States securities markets.

2. The sale to IIT and purchase by IIT (from the \$121,000,000 proceeds of the sales of United States securities) of the Vencap preference shares for \$3,000,000 had an effect on the United States securities markets.

3. The use by Vencap of a portion of the \$3,000,000 to purchase listed and unlisted United States securities had an effect on the United States securities markets.

4. The misappropriation by Pistell and Vesco of the \$3,000,000 resulted in securities losses to the United States fundholders of IIT.\*

5. A notorious stock fraud designed and engineered by United States citizens (Vesco and others) had the inexorable effect of damaging investors' confidence in the United States securities market and thus had an effect on the United States securities markets.

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\* See Leasco, supra at pp. 1337-38, where this Court looked through a Netherlands Antilles entity to the United States beneficiary of the transaction.

The applicability of subject matter jurisdiction in this case was graphically underscored in a comparable situation in a Vesco-related Southern District case. In International Controls Corp. v. Vesco, 73 Civ. 2518, U.S.D.C., S.D.N.Y., August 18, 1973 (unreported decision), transcript p. 21, District Judge Inzer B. Wyatt stated as follows on a question of enforcing a purported prior property interest in a yacht:

"But it seems to me that we have just got it down to the question of how can I let this yacht go? Vesco has made a monkey out of the United States already because he got away and they could not catch him in the Bahamas and then he skipped to Costa Rica, and they could not get him there because he has bought up the Costa Ricans.

"Wouldn't this Court be the laughing stock of the civilized world if he succeeded, by a series of flim-flam maneuvers with Panamanians and Bahamians, in spiriting a valuable yacht out of the jurisdiction and then laughing up his sleeve?"

In a related appeal, this Circuit specifically recognized subject matter jurisdiction in the context of a fraud with international implications (International Controls Corp. v. Vesco, 490 F.2d 1334, 1356, (2d. Cir.), cert. denied, \_\_\_ U.S. \_\_\_, 94 S.Ct. 2644 (1974)):

"Although we have scarcely plumbed the depths of Vesco's alleged financial manipulations, we have attempted to describe the intricacies of the web spun by him and his associates in their alleged scheme to ensnare the assets of ICC and its subsidiaries. Emerging from this maze of securities schemes, of corporate shells and subsidiary spin-offs, one point stands out in bold relief: the ingenious plotter cannot find a medium more supple

than the world of securities to effectuate his design. Thus, we find in these appeals further proof of the wisdom in adopting a flexible approach to the application of Section 10(b), a judicial construction consonant with that Section's broad prophylactic purpose. Confidence in our securities markets can only be maintained by establishing a protective shield which cannot be circumvented by recourse simply to the novel, to the unexpected, or to entanglements difficult to unravel."

See also Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 495 F.2d 228, 235 (2d Cir. 1974):

"Moreover, in applying the antifraud provisions of the securities laws to the facts of this case, it is important to bear in mind that 'Congress intended securities legislation enacted for the purpose of avoiding frauds to be construed 'not technically and restrictively, but flexibly to effectuate its remedial purposes.' . . . This policy of flexible, non-technical construction of the securities laws has provided the underpinning for the results in recent cases involving specific violations of the antifraud provisions of the securities laws. E.g., Superintendent of Insurance v. Bankers Life & Casualty Co., 404 U.S. 6, 12 (1971); SEC v. Glen-Arden Commodities, Inc., 493 F.2d 1027, 1033-34 (2 Cir. 1974); International Controls Corp. v. Vesco, 490 F.2d 1334, 1345 (2 Cir. 1974). See Chris-Craft Industries, Inc. v. Piper Aircraft Corp., 480 F.2d 341, 357, 363 (2 Cir.), cert.denied, 414 U.S. 910 (1973)." Footnote omitted.

It is sad to say, but this case is as American as apple pie.

POINT II

THE UNITED STATES SECURITIES  
LAWS HAVE BEEN VIOLATED

A. The Theft of \$3,000,000.

The transfer of \$3,000,000 from IIT to Vencap and Pistell was nothing more than blatant thievery thinly disguised as a sale of securities. The defendants tout Pistell as an expert financier. Pistell touted Graze as an expert manager of mutual funds. However, IIT's "investment" in Vencap was so outlandish that even the most naive of investors would not have made it. The "investment" of \$3,000,000 was a theft, and a theft (disguised as a securities transaction) is a violation of the United States securities laws. See Superintendent of Insurance v. Bankers Life & Cas. Co., 404 U.S. 6 (1971); Securities and Exchange Commission, v. Manor Nursing Centers, Inc., 458 F.2d 1082 (2d Cir. 1972).

The potency of the incriminating evidence against the defendants provided by the terms and conditions of the preference shares cannot be overstated; this document is the "smoking gun" left at the scene of the crime; the fingerprints on the safe's tumblers; the laundry mark on the bloody shirt.

IIT put in \$3,000,000 out of total Vencap capital of \$3,004,000. As 99.9% equity holder IIT got:

1. No vote at shareholders meetings.
2. No representation on the board of directors.
3. No voice in management.
4. No current income.
5. No realistic prospect of ever receiving any dividends.
6. No liquidity.
7. No possible market for its "investment".
8. No covenants or restrictions to protect its "investment".
9. No potential for capital appreciation.
10. No provision to secure redemption.
11. No sinking fund.
12. No periodic or other reports from management.
13. No audited financial statements.
14. No restrictions on use of proceeds.

IIT's "investment" in Vencap was a perpetual interest free loan -- a neat feat of legal legerdemain -- a nice kettle of accounting alchemy.

Pistell and his shell companies now claim that Graze based IIT's investment decision "on confidence in Pistell" and that to protect his reputation Pistell would

share his profits, if any, in some undisclosed manner on the basis of an "oral", "face-to-face" agreement with Graze in accordance with the "spirit" of the deal. (Vencap Brief, pp. 33-35; Pistell Brief, pp. 16, 46-47). This is incredible, among other reasons, because (a) Pistell has not demonstrated an eleemosynary bent towards IIT and (b) it is inconsistent with Graze's duty to follow a "prudent investment policy". (A.1014a.) If true, it is another material omission from the three page memorandum which the defendants testified was accurate and complete in all respects. "O, what a tangled web we weave when first we practise to deceive." Scott, Lochinvar, canto 6, stanza 17.

In a monumental understatement, Vencap's brief admits that IIT turned "over \$3,000,000 to Pistell on a largely unrestricted basis" (Vencap brief, p. 47). Small wonder that Judge Stewart concluded that if Vencap earned \$500,000,000 it would be divided (a) \$180,000 to IIT and (b) \$499,820,000 to Pistell (and Blackman if he is, in fact, more than a strawman). IIT put up 99.9% of the money and gets 0.04% of the profits.

No parties engaged in arms' length bargaining would have agreed to such a transaction.

B. The "Three Page Memorandum".

The District Court found that the three page memorandum\* "was prepared at Pistell's instructions to provide a basis for IIT's transfer of \$3,000,000. The three page memorandum was prepared 'in connection with the private placement of securities'." (A.954a.)

The District Court concluded that:

"Based upon the above discussed facts, I conclude that the purpose of the three-page memorandum prepared at the instruction of Pistell on behalf of Vencap was to induce IIT to finalize its general inclination to invest \$3,000,000 in Vencap in exchange for 30,000 preference shares." (A.961a.)

In a footnote to the above-quoted paragraph, Judge Stewart wrote:

"As noted above, the only other purpose which would reasonably explain this memorandum is that it was part of the conspiracy alleged and was prepared for the purpose of making the transaction look more technically like an arms-length one." (A.961a.)

Judge Stewart went on to conclude:

"I further conclude that the plaintiffs have demonstrated that they will probably succeed in showing that the memorandum was false and misleading under the circumstances that Vencap 'proposes to offer on a very limited basis an aggregate initially of \$3,000,000 in preferred shares...to a select group of sophisticated investors' who recognize that 'risk deserves a high return...' is materially misleading in light of the agreement which was being prepared during the same period when the memorandum was prepared.

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\* The three page memorandum was annexed as an Exhibit to Judge Stewart's Opinion and Order dated July 3, 1974 and is reproduced in the Appendix at A.967-70a.

"The statement that Vencap is contemplating 'a broad investment base designed to offer...short and long term returns which will inure primarily to the benefit of the preferential capital investors' in Vencap is misleading in light of the one-sided agreement between Vencap and IIT, and may even reach the level of common law fraud. Defendants' counsel stressed that the timing of the preparation of the purchase agreement and also of the three-page memorandum made the three-page memorandum but a 'memorializing' of Pistell's 'discussions with IIT as to the formation of Vencap, its objectives and the initial transaction in which it was interested.' The facts not only do not support such a contention, but because of the proximity in time of preparation of the agreement and the memorandum it is only reasonable to assume that Pistell knew that the terms of the agreement would not in any way allow Vencap's investments to 'inure primarily to the benefit of the preferential capital investors' of Vencap. During the course of the preliminary injunction hearing, plaintiffs' counsel demonstrated that the terms of the agreement would allow Vencap to earn \$500,000,000 and IIT to get only \$180,000. (Transcript of hearing, pp. 766-8.)[\*] The demonstration was based on an accurate reading of the agreement. Counsel for defendants did not contest the accuracy of this characterization of the terms of the agreement.

"In light of the circumstances, unless one infers a conspiracy in which case IIT knew everything that Pistell knew,\*\* there were also substantial and material omissions from the three-page memorandum. The three-page memorandum failed to disclose that the preference shareholders could receive only one-third of the net gain of Vencap and then only at the pleasure of the holders of the

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\*The Appendix reference is A.920-21a.

\*\*Court's footnote - "Such an inference is not unreasonable in light of the fact that lawyers were representing both parties. There was testimony that the agreement reached between IIT and Vencap created practically inverse rights as between the investor and the management corporation when compared with usual investment agreements, even in high risk venture capital investments." (A.963a.)

ordinary shares, Pistell and Blackman. It also failed to disclose that Pistell was in severe financial trouble and owed the United States government more than \$500,000 in back taxes and that the United States government had imposed a lien on Pistell's property. The memorandum made no disclosure that a substantial portion of the money invested by IIT in Vencap would be used to secure a \$590,000 loan by Intercapital to Pistell personally for the personal benefit of Pistell, i.e., to pay his back taxes owed to the United States government, and the fact that much of the cash transferred to Vencap by IIT would be turned over to companies in which Pistell had a substantial personal interest." (A.962--63a.)

Pistell testified that Murphy authored the "three page memorandum". (A.1814a.) Taylor stated that Murphy drafted the "three page memorandum" in conjunction with Pistell.\* (A.659-60a.) Both Pistell and Murphy maintained that the blatantly false and misleading "three page memorandum" was complete and accurate as written. (A.683-84, 778-82a.)

Securities and Exchange Commission v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir., 1968), cert. denied, 394 U.S. 976 (1969), stands for the proposition that

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\* We submit that Vencap's brief is mistaken in suggesting ". . . , Vencap's Bahamian attorneys prepared, in the Bahamas, at Pistell's request, a memorandum outlining the general objectives of Vencap." (Vencap, Intervent and Intercapital Brief, p. 12.) Murphy's testimony at the hearing might be susceptible of this conclusion but it was self-serving and (a) inconsistent with Pistell's testimony (A.667, 678, 1350-51, 1814-16a), (b) inconsistent with Taylor's testimony (A.659, 667a) and (c) given after the point had come into issue in litigation.

even a negligent misrepresentation of material fact, i.e., any fact "...which in reasonable and objective contemplation might affect the value of the corporation's stock or securities..." (Id. at 849) is a violation of Section 10(b) and Rule 10b-5 thereunder. The court there pointed out:

"The dominant congressional purposes underlying the Securities and Exchange Act of 1934 were to promote free and open public securities markets and to protect the investing public from suffering inequities in trading, including, specifically, inequities that follow from trading that has been stimulated by the publication of false or misleading corporate information releases." (Id. at 858)

The matter at bar, on the other hand, does not involve negligence. It is one of a calculated plan to deceive for the purpose of misappropriating IIT's assets.

A succinct pronouncement of the Supreme Court with respect to the United States securities laws is particularly apt in the present situation:

"In the enforcement of an act such as this it is not inappropriate that promoters' offerings be judged as being what they were represented to be." Securities and Exchange Commission v. C. M. Joiner Leasing Corp., 320 U.S. 344, 353 (1943).

Accord, Securities and Exchange Commission v. United Benefit Life Ins. Co., 387 U.S. 202, 211 (1967); cf., Ginzburg v. United States, 383 U.S. 463, 472 (1966).

C. Misuse of the Proceeds.

Instead of utilizing the \$3,000,000 received by Vencap from IIT for venture capital investing, Pistell proceeded to treat the funds as his own. Almost immediately upon receipt of the \$3,000,000, \$590,000 was "loaned" to Pistell, utilizing the services of an obscure Swiss bank. The loan proceeds were totally dissipated by Pistell to pay the arrears on his United States and New York State taxes, to pay overdue loans, to pay overdue alimony and for other personal uses. (A.585-87, 595-98, 4146a.) This deluge of check writing was handled by Taylor who signed the checks. The checks were drawn on Intercapital's account at a New York City bank. The account holder's address was 99 Park Avenue, New York City. (A.595a.)

Pistell diverted in excess of \$160,000 to purchase a home for himself in the Bahamas. (A.533a.)

Pistell caused \$672,000 to be invested in the shares of Lincoln American Corp., an American Stock Exchange Company, which Pistell had been running prior to his moving on to greener pastures with IIT's money. (A.4149a.) This stock is still in Vencap's diminishing portfolio and Vencap has an unrealized loss of \$340,000 on the investment. (A.4153a.)

The misuse of the proceeds of the sale of securities is a violation of the United States securities laws. See Superintendent of Insurance v. Bankers Life & Cas. Co., supra; Securities and Exchange Commission v. Manor Nursing Center, Inc., supra; Cooper v. North Jersey Trust Co., 226 F.Supp. 972 (S.D.N.Y. 1964).

D. Breach of Fiduciary Duty and Corporate Waste.

Pistell, the controlling person of Vencap, owed a fiduciary duty to IIT, the preference shareholder in Vencap. Pistell breached this fiduciary duty by treating the funds in the Vencap treasury as his personal checkbook and squandering those funds on paying his personal obligations, on extravagant spending for himself and others, and on investing in the shares of Lincoln American Corp., an American Stock Exchange Company which had been run by Pistell. Both breach of fiduciary duty to minority interests and corporate waste are violations of the United States securities laws in appropriate cases, of which this is one. See Superintendent of Insurance v. Bankers Life & Cas. Co., supra; Schlick v. Penn-Dixie Cement Corp., CCH Fed. Sec. L. Rep. ¶ 94,853 (2d Cir. 1974); and Travis v. Anthes Imperial Limited, supra at p. 527.

POINT III

THE DISTRICT COURT HAS SUBJECT  
MATTER JURISDICTION PURSUANT TO  
SECTION 1350 OF THE JUDICIAL CODE

Plaintiffs have demonstrated that the District Court has jurisdiction over the subject matter of this action pursuant to the United States securities laws. Once jurisdiction under the securities law attaches, the common law claims for relief are engulfed by the time honored principles of ancillary and pendent jurisdiction. The District Court also concluded that plaintiffs had demonstrated that "It is probable that jurisdiction is also founded \* \* \* [under] §1350 of the Judicial Code, 28 U.S.C. §1350 (an action by an alien for a tort committed in violation of the law of nations or a treaty of the United States).\*\*\*" (A.960a.)

Section 1350 provides that:

"The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."\*

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\* On a broader scale than that involved in the present appeal the "game" is readily apparent. Bernard Cornfeld (the founder of the IOS complex) and Vesco attempted to structure their international frauds so as to avoid the law of any one jurisdiction. By so doing, they violated the law of all jurisdictions - the law of nations. Cornfeld had constructed the IOS complex by "internationalizing his operation so as to

Securities fraud, at least as such fraud was carried out by Vesco, Pistell and their minions, is only a specialized form of stealing. Thievery is a crime in every civilized nation. A fraud (a tort) when it reaches the proportions of a \$3 million "investment" in a sham company and gross misappropriations is nothing more than blatant thievery. After attempting to picture Pistell as a genius of international finance, defendants' attempts to picture him as an innocent bystander in possible Vesco chicanery strike a sour note. The entire course of dealing between Pistell, his companies, Murphy, Taylor and Havens Wandless on the one hand and Vesco and his associates on the other hand demonstrates that Pistell knew something was rotten. A financial wizard like Pistell had to know that IIT's "investment" in Vencap was without basis. If Pistell, his

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use the most advantageous legal loopholes of all the nations of the earth and by exploiting modern communications technology to link his free-wheeling global empire." Cantor, THE BERNIE CORNFELD STORY, Lyle Stuart, Inc. (New York 1970), at p. 24. This structure was continued and expanded upon by Vesco: "Vesco flaunted the fact that he was virtually exempt from prosecution because national securities laws, he discovered, cannot be enforced internationally. He based his 'success' on the contemptuous reasoning that if he moved fast enough no country could apply its securities regulations. Vesco was riding the crest of a jet-age trend that was transforming even the most regional exchange into an internationally accessible market place. When considered on the face of his achievements, hardly a more eloquent argument existed for the creation of an international securities commission to coordinate and supplement the efforts of national agencies in cases that overflow into several sovereign jurisdictions. After all, he made fact of theory." Hutchison, VESCO, Praeger Publishers, Inc. (New York 1974), at p. 9.

companies and his helpers did not fraudulently induce the ludicrous "investment" then they must have joined Vesco's fraudulent plans and schemes with glee.

When men use national boundaries to escape from being accountable under the law of any nation, they violate the law of nations. Pistell, Vencap, Intercapital and Intervent, all operated from New York City. In attempting to avoid the jurisdiction of the laws of the United States, Vencap wore the mask of a Bahmanian corporation, Intercapital was costumed as a Netherlands Antilles corporation and matters of "business" decided upon in New York were formally "ratified" a few miles off the Florida coast.

A definition of the phrase "in violation of the law of nations" can be found in Lopes v. Reederei Richard Schroder, 225 F.Supp. 292, 297 (E.D. Pa. 1963):

"[T]he conclusion of this court is that the phrase 'in violation of the law of nations', for the purpose of deciding this issue, means, inter alia, at least a violation by one or more individuals of those standards, rules or customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or in dealing inter se." [footnote omitted]

It is respectfully submitted that international securities fraud, sophisticated thievery, involving several jurisdictions, falls squarely within the Lopes definition of violations of the law of nations.

Abdul-Rahman Omar Adar v. Clift, 195 F.Supp. 857, 863-65 (D. Maryland 1961), adopts the standard of harm to the interests of nations to test whether the law of nations has been violated. In the Vencap "deal", the interest of the United States was harmed by the shaken faith in its financial institutions, by the defrauding of Americans and by the rapid liquidation of \$121 million in United States securities; the interest of Luxembourg was harmed by the defrauding of a Luxembourg entity, IIT, and the damage to its reputation as an international financial center; the interest of the Bahamas was harmed since that was the place of incorporation of Vencap (the vehicle for the fraud) and, according to the defendants, the scene of the crime; the interest of the Netherlands Antilles was harmed since those islands were duped into providing a shield for Intercapital, a chain in Pistell's web of deception and self-dealing; and the interest of the United Kingdom was harmed because London was purportedly the home base of Graze, the approver of the sell-out of IIT's United States securities, and, again according to the defendants, the scene of certain of the acts in the illicit deal. Furthermore, the interests of all free nations are harmed when international securities frauds go unpunished and defrauders escape by weaseling through loopholes in domestic law jurisdiction.

In Valanga v. Metropolitan Life Ins. Co., 259

F. Supp. 324, 328 (E.D. Pa. 1966), the Court determined that the law of nations was violated when:

"Such conduct transcends the violation of local norms embodied in local domestic relations and personal injury actions since it is injected with overtones which impinge upon the standards which nations have established to control their relationships with one another.\*\*\* This conduct immediately raises issues of international import and conceivably could constitute an affront to the power and dignity of the nations involved."

The Court in Valanga summarized by stating that "A violation of the law of nations means a violation of those standards by which nations regulate their dealings with one another inter se." Ibid. The standards of civilized nations are not met by the utilization of supposed jurisdictional loopholes to vent fraud and theft upon persons in other nations.

The record in this case establishes an intent to dodge the law by bobbing and weaving between national boundaries. Rather than hold that "no law" is applicable, we ask this Court to rule that "all laws" are applicable and that the District Court has jurisdiction over such a tort.

#### POINT IV

#### THE DISTRICT COURT HAD JURISDICTION PURSUANT TO SECTION 302 OF THE NEW YORK CIVIL PRACTICE LAW AND RULES

The District Court noted that, in addition to jurisdiction under the United States securities laws, it had probable jurisdiction under Section 302 of the New York Civil Practice Law and Rules. (A.960-61a.) Defendants argue that the District Court's reference to Section 302 indicates that the District Court confused subject matter and in personam jurisdiction. See Brief of Murphy, Taylor and Havens Wandless at p. 24.

The defendants' argument misses the point. Section 302 is replete with references to conduct which forms the bases for jurisdiction in New York, e.g., "transacts any business within the state", "commits a tortious act within the state", "commits a tortious act without the state causing injury to persons or property within the state." Conduct of the defendants is what this action is all about, i.e., the conduct of the defendants in committing fraudulent acts and conduct of the defendants in planning, aiding and abetting and carrying out their fraudulent scheme. Much of that conduct took place in New York.

Furthermore, plaintiffs have alleged, and indeed have demonstrated, that defendants violated Section 352(c) of the General Business Law of the State of New York. Implicit in the District Court's finding of violations of the federal securities laws is the finding of violations of the state law. It would certainly be a strange result to find a violation of the substantive statute (Section 352(c) of the General Business Law) without a finding pursuant to the jurisdictional statute (Section 302 CPLR).

POINT V

THE DECISION OF THE DISTRICT  
COURT TO ISSUE A PRELIMINARY  
INJUNCTION AND TO APPOINT A  
TEMPORARY RECEIVER WAS NOT  
"CLEARLY ERRONEOUS"

As discussed above, the plaintiffs submit that this Court should reach the merits of the jurisdictional issues at this time as though it were an appeal under Section 1292(b). This appears to be the basis for the defendants' appeal. If the Court is not so inclined, plaintiffs submit that the decision below granting the injunction should be affirmed on the grounds usually applicable to a review of a grant of preliminary injunction.

The standard adopted by this Court when reviewing a decision of the District Court in matters such as this one

is that the District Court's findings will not be disturbed unless such findings are "clearly erroneous."

Rule 52(a) of the Federal Rules of Civil Procedure is ample authority for this Court's "clearly erroneous" standard of review. Rule 52(a), in pertinent part, states:

"In all actions tried upon the facts without a jury..., the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action.... Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

See also Dopp v. Franklin National Bank, 461 F.2d 873 (2d Cir. 1972).

The District Court scrupulously followed this Court's admonitions concerning evidentiary hearings on applications for preliminary injunctions. Securities and Exchange Commission v. Spectrum, Ltd., 489 F.2d 535, 540 (2d Cir. 1973).

Plaintiffs (a) demonstrated a likelihood that they would prevail on the merits, and that they would be irreparably injured unless a preliminary injunction issued, (b) raised substantial questions and (c) demonstrated that they would have suffered more hardship if a preliminary injunction had not issued than defendants would suffer if a

preliminary injunction had issued. See Charlie's Girls, Inc. v. Revlon, Inc., 483 F.2d 953 (2d Cir. 1973); Exxon Corp. v. City of New York, 480 F.2d 460 (2d Cir. 1973); Gulf & Western Industries, Inc. v. Great A. & P. Tea Co., 476 F.2d 687 (2d Cir. 1973); Robert W. Stark, Jr., Inc. v. New York Stock Exchange, Inc., 466 F.2d 743 (2d Cir. 1972); Checker Motor Corp. v. Chrysler Corp., 405 F.2d 319 (2d Cir. 1969), cert. denied, 394 U.S. 999 (1969).

Plaintiffs also demonstrated the need for the appointment of a receiver to prevent the further dissipation and waste of Vencap's assets and to take action to retake for Vencap funds wrongfully paid out. See Securities and Exchange Commission v. Koenig, 469 F.2d 198, 202 (2d Cir. 1972); Tanzer v. Huffines, 408 F.2d 42 (3d Cir. 1969); Securities and Exchange Commission v. Capital Counsellors, Inc., 332 F. Supp. 291, 304 (S.D.N.Y. 1971); Adelman v. CGS Scientific Corp., 332 F.Supp. 137, 147 (E.D. Pa. 1971); Squire v. Ordemann, 194 N.Y. 394, 87 N.E. 435 (1909); Cohnfeld v. Tanenbaum, 176 N.Y. 126, 68 N.E. 141 (1903); 7 Moore, Federal Practice, § 66.05(1), p. 1920.3 (2d. Ed. 1974).

In the factual setting adduced as a result of the comprehensive and contested hearing in the District Court, the issuance of a preliminary injunction and appointment of a receiver was fully justified, certainly not "clearly erroneous" and should be affirmed.

POINT VI

PLAINTIFFS' CROSS-APPEAL  
SHOULD BE GRANTED

Plaintiffs have cross-appealed from an Order, entered by the District Court on September 3, 1974, which authorized Vencap to issue checks in the total sum of \$40,000 in connection with obtaining a diamond, sapphire and gold mining concession in The Cameroons. (A.973-74a.) That Order was entered over the vigorous objections of the plaintiffs who requested and were denied an evidentiary hearing. Plaintiffs were unable to probe into the circumstances surrounding that further dissipation of IIT's "investment" in Vencap. The District Court allowed the \$40,000 disbursement of funds without any decision on the merits of The Cameroons' deal by either the Court or the receiver. The District Court had no facts before it to justify its decision.

The defendants have displayed a cavalier attitude toward funds supplied by IIT. The context of this matter is as follows: Pistell has spent or lost almost \$2,000,000 of IIT's "investment" in less than two years. The following "pie in the sky" deals upon which Pistell has spent Vencap money have come to naught:

- (a) Cattle deal;
- (b) Recreation venture with former Senator Hoadly Dean;
- (c) Rosario Mines in Mexico;
- (d) Genetically growing crustaceans in the Carribean;
- (e) A land deal with Senor Correra of Mexico;
- (f) Prospective venture in hotel chain in Morocco;
- (g) Purchase of IOS International Reinsurance Holding Company, Ltd.

All of Pistell's "pie in the sky" deals have fallen through.  
(A.803-05, 1511a.)

Defendants' briefs tout Pistell's profit on one oil deal; they ove look that almost \$75,000 of the "profit" went to Havens Wandless in the form of fees. (A.3463a.) What they are saying, in effect, is that he did not lose each and every single time he put IIT's chips on the gambling table. He may not have lost every time, but by the end of the evening IIT was well nigh broke on his "success".

The Cameroons' caper was yet another flight into the wild blue yonder. After the Court issued a temporary restraining order at the outset of this litigation, defendants prevailed upon the Court to allow the disbursement of \$33,998.19 for emergency expenses upon the express commit-

ment to supply bills and confirmations. Defendants have never met that commitment. (A.981a.) The Cameroons followed.

The monthly Vencap outflow under Pistell's aegis was \$100,000. Plaintiffs could not sit by and see the same thing happen under the receiver's aegis; hence this cross-appeal.

The District Court also allowed Vencap to loan \$22,967.50 to Sangin, a Turkish wine importation scheme. (A.985a.)

In view of Pistell's dissipation of IIT's "investment", it was plain error for the District Court to approve the use of IIT's funds in The Cameroons. That is especially true when the Court found defendants' conduct to be such that a receiver was required to preserve the assets.

IIT was bound to follow a "prudent investment policy". This must have been known to Pistell, first because of his self-proclaimed breadth of knowledge about financial matters in general and secondly because of his activities as a confidant and advisor to Graze. The layman can put it better - in another context the authors of "Do You Sincerely Want To Be Rich?" wrote (p. 116):

"These rapid evolutions never caused Bernie and Ed [Bernard Cornfeld and Edward Cowett] to lose the air of gravity and high purpose that is conveyed by the best of their printed work. They

liked to decorate their prospectuses with elevated quotations, and the 1968 one, which also contained the assurances about short sales, contained the famous statement of the Prudent Man Rule made by Justice Samuel Putnam of the Supreme Judicial Court of Massachusetts in 1830:

All that can be required of a Trustee to invest is that he conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion, and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested.\*

If there was a light, dry hum to be heard somewhere in Massachusetts in May 1968, it was presumably Mr. Justice Putnam revolving in his grave like a high-speed gas turbine."

Justice Putnam must have turned over a few more times in September 1974 when a court-appointed receiver was permitted to authorize Pistell's \$40,000 Cameroons' adventure.

Pistell has testified that he is a man of substantial means. (A.982a.) No evidence was presented to the District Court to demonstrate why, if the urgency of a \$40,000 payment was monumental, Pistell could not have secured the payment from sources other than Vencap's depleted treasury. Pistell contends that "plaintiffs argued out of both sides of their mouths" with respect to his financial resources (Brief of Pistell, p. 50). This contention misses the mark,

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\* Harvard College v. Amory, 9 Pick 446, 461 (Mass. 1830). Footnote supplied.

but is well based factually since Pistell speaks with a forked tongue. When it is to his advantage, he claims to be a multimillionaire, and when it is to his disadvantage he claims to be unable to pay for airline tickets. IIT's fundholders are not, we submit, properly faced with Hobson's choice; rather, it is Pistell who is bound by the problems of his own inconsistent testimony, not the plaintiffs.

District Judge Inzer B. Wyatt's remarks are, once again, particularly apt:

"Wouldn't this Court be the laughing stock of the civilized world if he succeeded, by a series of flim-flam maneuvers with Panamanians and Bahamians, in spiriting a valuable yacht out of the jurisdiction and then laughing up his sleeve?" International Controls Corp. v. Vesco, 73 Civ. 2518, U.S.D.C., S.D.N.Y., August 18, 1973 (unreported decision), transcript p. 21.

The Order allowing IIT's \$40,000 to be used for Pistell's mining venture must be reversed.

#### CONCLUSION

This is not a case of men who walk the limits of the law; it is a case of men who spurn the law and attempt to walk outside the limits of its enforcement. We respectfully request that this Court affirm the Order of the District Court which granted a preliminary injunction and appointed a receiver and reverse the Order of the District Court which

granted authority to Vencap to disburse \$40,000 for The  
Cameroons' project.

Respectfully submitted,

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Appendix A

List of IOS Related Cases Pending  
In the Federal Court for the  
Southern District of New York

1. Securities and Exchange Commission v. Robert L. Vesco, Norman LeBlanc, Milton F. Meissner, Ulrich J. Strickler, Stanley Graze, Frank G. Beatty, Richard E. Clay, Wilbert J. Snipes, James Roosevelt, Frederic J. Weymar, Gilbert R. J. Straub, C. Henry Buhl, III, Allan C. Butler, Laurence B. Richardson, John D. Schuyler, Edward Stoltenberg, Howard F. Cerny, Georges Philippe, Allan F. Conwill, Raymond W. Merritt, John S. D 'Alimonte, IOS Ltd., International Controls Corp., Bahamas Commonwealth Bank, Ltd., Overseas Development Bank, Luxembourg, S.A., International Bancorp, Ltd., Value Capital Ltd., Butlers Bank Ltd., Transglobal Financial Services Ltd., Kilmorey Investments Ltd., Global Holdings Ltd., Global Financial Ltd., IIT Management Co., S.A., F.O.F. Management Co., Ltd., Venture Management Co., Ltd., Transglobal Growth Fund Management Co., Ltd., Bank Contrade, Ltd., Venture Fund (International) N.V., Fund of Funds, Ltd., Transglobal Growth Fund, Ltd., IIT, an International Investment Trust, Consulencia Verwaltungs, A.G.

72 Civ. 5001(CES)

2. The Fund of Funds, Limited, F.O.F. Proprietary Funds, Ltd., IOS Growth Fund, Limited, a/k/a Transglobal

Growth Fund, Limited and Calcasieu Venture, N.V. v. Robert L. Vesco, Norman P. LeBlanc, Milton F. Meissner, Allan F. Conwill, The Bank of New York and Willkie Farr & Gallagher. 74 Civ. 1980 (CES)

3. The Fund of Funds, Limited, F.O.F. Proprietary Funds, Ltd., and IOS Growth Fund, Limited, a/k/a Transglobal Growth Fund, Limited v. Arthur Andersen & Co., Arthur Andersen & Co. (Switzerland), and Arthur Andersen & Co., S.A. 75 Civ. 540 (CES)

4. The Fund of Funds, Limited, F.O.F. Proprietary Funds, Ltd., and IOS Growth Fund, Limited, a/k/a Transglobal Growth Fund, Limited v. John M. King, A. Rowland Boucher, Allan F. Conwill, John Doe and Mary Roe, as Executors of the Estate of Edward M. Cowett, deceased, and The Bank of New York and Willkie Farr & Gallagher. 74 Civ. 1981 (CES)

5. Securities and Exchange Commission v. Capital Growth Company, S.A. (Costa Rica), Capital Growth Company, S.A. (Panama), New Providence Securities, Ltd., S.A., Sheffield Advisory Company, Sheffield Advisory Company, S.A., EHG Enterprises, Inc., Clovis W. McAlpin, Sanford C. Shultes, Ariel E. Gutierrez, Enrique H. Gutierrez. 74 Civ. 3779

6. Howard Bersch v. Drexel Firestone, Inc., Drexel Harriman Ripley, Banque Rothschild, Hill Samuel & Co., Limited, Guinness Mahon & Co., Incorporated, Pierson. Heldring & Pierson, Smith, Barney & Co., Incorporated,

J. H. Crang & Co., Investors Overseas Bank Limited, Arthur Andersen & Co., I.O.S., Ltd. and Bernard Cornfeld. 71 Civ. 5373 (RLC)

7. IIT, an International Investment Trust, and Georges Baden, Jacques Delvaux and Ernest Lecuit, as Liquidators for IIT, an International Investment Trust v. Hornblower & Weeks -Hemphill, Noyes Incorporated, Alexander Grant and Company, EHG Enterprises, Inc., EHG International Finance Corp., N.V., E. H. Gutierrez AIA & Associates, Enrique H. Gutierrez, Ariel E. Gutierrez, Robert L. Vesco, Milton F. Meissner, Norman LeBlanc, Stanley Graze, Ulrich Strickler, Richard Clay, Gilbert Straub, Alberto Alvarez, Howard F. Cerney, Clovis McAlpin. 74 Civ. 3484 (CES)

8. Elizabeth Maiden, Trustee of the Pound Ridge Trust, George Marshall Houx, Karl E. Schlachter and Marion P. Schlachter, Worcester County National Bank, Shareholders Associates, Inc. and Shareholders Capital Corporation, IIT, an International Investment Trust, and Georges Baden, Jacques Delvaux and Ernest Lecuit, as Liquidators for IIT, an International Investment Trust, and on behalf of the Fundholders of IIT, an International Investment Trust v. Carl Biehl, Jeanne D. Burkley, Stanley E. Burkley, N. Leslie Carpenter, William J. Casey, Alfred J. Moran, Lawrence F. Orbe, III, Betty M. Swinny, James H. Swinny, Joseph S. Zuccaro, du Pont Glore Forgan, Incorporated, Glore Forgan,

William R. Staats, Incorporated, Glore Forgan Staats, Incorporated, Glore Staats Corporation, Maurice H. Stans, Charles H. Hodge, Gerald T. Hodge, Thomas D. Mann, John C. Harned, Edward F. Milholland, Jr., Gilbert W. Smith, Samuel A. Hartwell, James Russell Forgan, Jr. and Florence F. Wheeler, and Ada Forgan Addington, and United States Trust Company of New York as the Executors or Administrators of the Estate of J. Russell Forgan, deceased, F. I. du Pont, Glore Forgan & Co., du Pont Glore Forgan Staats, Incorporated, Haskins & Sells, C. Henry Buhl, III, Martin Brooke, Joop Melse, Melvin Rosen, Pierre Rinfret, Bernard Cornfeld, Robert Roe and Pauline Poe as Executors of the Estate of Edward M. Cowett, Erich Mende, James Roosevelt and John Does 1 through 10.

74 Civ. 4690 (CES)

9. International Controls Corp. v. Robert L. Vesco, Harry L. Sears, Frank G. Beatty, Norman LeBlanc, Stanley Graze, Milton F. Meissner, Ulrich J. Strickler, Richard E. Clay, Wilbert J. Snipes, Frederick J. Weymar, Gilbert R. J. Straub, C. Henry Buhl III, Ralph P. Dodd, Alwyn Eisenhower, George Phillipe, Joel Grady, Shirley Bailey, Vesco & Co., IOS Ltd., Bahamas Commonwealth Bank, International Bancorp, Kilmorey Investments Ltd., Value Capital Ltd., Global Holdings Ltd., Global Financial Ltd., Butlers Bank, Ltd. (now known as Who Holdings Ltd.), Allan J. Butler, Bank Cantrade Ltd., Fairfield Aviation Corporation,

Fairfield General Corporation, Skyways Leasing Corporation  
and Marine Midland Bank. 73 Civ. 2518

10. International Controls Corp. v. Robert  
L. Vesco. 74 Civ. 1588

11. United States of America v. John N. Mitchell,  
Harry L. Sears, Maurice Stans and Robert L. Vesco. 73 Cr.  
439

12. United States of America v. Robert L. Vesco.  
73 Cr. 518

13. United States of America v. Robert L. Vesco.  
73 Cr. 707

14. United States of America v. John M. King and  
A. Rowland Boucher. 75 Cr. 70



AAM

Service of 2 copies of this within  
Brief is admitted this  
15 day of February 1945

Arthur H. Westminster

ATTORNEY

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Cross = Appellee Richard C. Rickett

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